No. 89-1649

In The

Supreme Court of the United States

October Term, 1989

EDWARD I. ISIBOR,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF THE STATE OF TENNESSEE, ET AL.,

Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CHARLES W. BURSON
Attorney General & Reporter
State of Tennessee

JOHN KNOX WALKUP*
Solicitor General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-1376

LINDA A. ROSS
Assistant Attorney General
State of Tennessee

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS FOR REVIEW

1. Whether the Court of Appeals correctly concluded that the district court did not err in failing to recuse itself.

2. Whether the Court of Appeals correctly found no error in the district court's conclusion that respondent's interest in fulfilling its educational mission outweighed petitioner's free speech interest, and in its further conclusion that respondents proved by a preponderance of the evidence that petitioner would have been removed as dean even in the absence of his public statements.

3. Whether the Court of Appeals correctly concluded that the district court's findings regarding petitioner's Title VII claim were well supported by the evidence.

4. Whether the Court of Appeals correctly found that the district court had properly decided the issue of qualified immunity.

5. Whether the Court of Appeals inappropriately designated its opinion in this case as not for publication.

PARTIES TO THE PROCEEDING BELOW

The petitioner in this action is Edward I. Isibor. The respondents are the Board of Regents of the State University and Community College System of the State of Tennessee, Tennessee State University, former Chancellor Roy Nicks, in his official capacity, Chancellor Thomas Garland, President Otis Floyd, and Vice President George Cox, in both their official and individual capacities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES CITED

TABLE OF AUTHORITIES – Continued

No. 89-1649

In The

Supreme Court of the United States

October Term, 1989

EDWARD I. ISIBOR,

Petitioner,

v.

BOARD OF REGENTS OF THE STATE UNIVERSITY AND COMMUNITY COLLEGE SYSTEM OF THE STATE OF TENNESSEE, ET AL.,

Respondents.

BRIEF OF THE RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, and is set forth at Petitioner's Appendix A. The unreported opinion of the district court is set forth at Petitioner's Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 14, 1989. On December

22, 1989, a Motion for Extension of Time to File Request for Rehearing, until January 11, 1990, was granted. No request for rehearing was filed with the Court of Appeals. The petition for a writ of certiorari was filed on March 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In 1987, the petitioner, a former Dean of the School of Engineering at Tennessee State University (TSU), filed suit in the United States District Court for the Middle District of Tennessee, pursuant to Title VII (42 U.S.C. §§ 2000e *et seq.*) and 42 U.S.C. § 1983. In his Title VII claim, petitioner alleged that he had been discriminated against on the basis of his race (black) with respect to his salary as dean, in that his salary was less than those of the white engineering deans at Memphis State University (MSU) and Tennessee Technological University (Tech.). Petitioner also alleged that he was removed from his position as dean in retaliation for exercising his First Amendment right to free speech, in violation of 42 U.S.C. § 1983.

Following a bench trial, the district court dismissed all of petitioner's claims. With respect to the Title VII claim of salary discrimination, the district court found that the respondents had articulated legitimate non-discriminatory reasons for the salary actions at issue and that petitioner had failed to carry his burden of persuasion that the articulated reasons were pretextual. (Pet.

App. B 83-87). As to petitioner's First Amendment retaliation claim, the district court, having reviewed the content, context, manner, time, and place of the specific instances of petitioner's speech, found that the interest of TSU in efficiently fulfilling its educational mission outweighed petitioner's interest in making such statements. (Pet. App. B 95-102). Further, the district court found that the respondents had proven by a preponderance of the evidence that petitioner would have been removed as dean even in the absence of his statements, given the overwhelming proof of petitioner's abusive, intemperate, and insubordinate behavior toward his supervisors, fellow faculty members, and employees of TSU. (Pet. App. B 102-107).

During the trial, after the conclusion of petitioner's case-in-chief and following five days of testimony, petitioner filed a motion to recuse, pursuant to 28 U.S.C. § 455(a). Petitioner asserted the existence of an appearance of partiality stemming from the district court's participation in prior judicial proceedings involving the desegregation of public institutions of higher education in Tennessee, including TSU. The district court denied the motion to recuse.

The Court of Appeals upheld the findings of the district court in all respects. After reviewing the facts established by the record relevant to petitioner's Title VII salary discrimination claim, the Court of Appeals concurred in the district court's findings of fact that petitioner had failed to prove that respondents' nondiscriminatory reasons for the salary differences among the engineering deans were mere pretext. (Pet. App. A 67-72).

In affirming the judgment of dismissal of petitioner's First Amendment retaliation claim, the Court of Appeals found, first, that the district court had reached the correct outcome in its application of the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968). (Pet. App. A 73-76). Further, the Court of Appeals concurred in the district court's finding that respondents proved by a preponderance of the evidence that petitioner would have been removed as dean even in the absence of any protected speech, citing the record's "overwhelming proof of [petitioner's] insubordinate and abusive behavior toward his supervisors, fellow faculty members and employees of TSU." (Pet. App. A 76).

Finally, the Court of Appeals found no abuse of discretion in the district court's denial of petitioner's motion to recuse (Pet. App. A 77-80), and no error in the trial court's decision on the individual respondents' qualified immunity as to petitioner's First Amendment retaliation claim. (Pet. App. A 80-81).

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S JUDICIAL DISQUALIFICATION ARGUMENT DOES NOT WARRANT REVIEW BY THIS COURT

In the courts below, petitioner urged the disqualification of the trial judge, relying upon 28 U.S.C. § 455(a), which requires a judge to disqualify himself "in any proceeding in which his impartiality might reasonably be questioned." Petitioner argued below that recusal of the

district judge was required because of the judge's prior participation in the case of *Geier v. Alexander*, 593 F.Supp. 1263 (M.D. Tenn. 1984), *aff'd* 801 F.2d 799 (6th Cir. 1986), which involved the desegregation of public institutions of higher education in Tennessee. Having failed in his previous arguments on this issue, petitioner now abandons the grounds for recusal urged in the courts below and asserts, for the first time, another alleged basis for disqualification of the district judge. A basis for disqualification within the contemplation of 28 U.S.C. § 455 simply cannot be extracted from the allegations upon which petitioner now relies.

Petitioner's assertion of the specter of the "appearance of partiality" is based, tenuously at best, on the fact that the trial judge was formerly a member of the state legislature, was a democratic gubernatorial candidate in 1974, and served as State Treasurer, all of which facts were widely known at the time of trial. Petitioner apparently did not consider the issue worthy of notice at any point in the proceedings until he failed to gain the desired results from either the district court or court of appeals. A timeliness requirement is applicable to § 455 for the very purpose of eliminating the use of a disqualification issue as part of a litigation strategy. *Delesdernier v. Porterie*, 666 F.2d 116 (5th Cir.), *cert. denied*, 459 U.S. 839 (1982); *In Re International Business Machines Corp.*, 618 F.2d 923 (2nd Cir. 1980); *U.S. v. Conforte*, 624 F.2d 869 (9th Cir.), *cert. denied*, 449 U.S. 1012 (1980).

Petitioner also makes the conclusory allegation that the trial judge is part of a "Nashville Political Network" that also includes the governor, a local attorney, and the Chief Judge of the Sixth Circuit Court of Appeals, and

insinuates that the members of this group act to protect each other from exposure of their corrupt practices. Petitioner's allegations are unsupported and irrational. Moreover, this case involved no issue of alleged wrongdoing on the part of any member of this conjectural "network". "Disqualification is appropriate only if the facts provide what an objective, knowledgeable member of the public would find to be a *reasonable basis* for doubting the judge's impartiality." *In Re United States*, 666 F.2d 690, 695 (1st Cir. 1981) (emphasis original). It is beyond contemplation that an objective member of the public would reasonably believe that the trial judge would jettison his impartiality and ethical commitments as a judge in the context of this case, based simply on his prior government positions and his political affiliation.

All judges come to the bench with a background of experience, associations, and viewpoints. Litigants are entitled to a judge free of personal bias, but not to a judge without any personal history before appointment to the bench. *See Brody v. President & Fellows of Harvard College*, 664 F.2d 10 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982) (fact of judge's graduation from defendant university not grounds for recusal); *Barry v. United States*, 528 F.2d 1094 (7th Cir.), *cert. denied*, 429 U.S. 826 (1976) (judge's prior position as United States Attorney does not require recusal unless case at issue arose before judge left that position).

While only citing 28 U.S.C. § 455(a), petitioner also appears to argue the existence of actual bias on the part of the trial judge, based on aspects of his rulings. (Pet. 22-28). Petitioner's arguments are based on misstatements of the record, the most glaring example of which is

his purported quotation of the trial court as having said of petitioner's witnesses, "I've said I'm going to disregard the other aspects of their testimony." (Pet. 27). What the record actually reflects is that, in a colloquy with the court, petitioner's attorney said that the fact that the witnesses had their personal opinions about *Geier v. Alexander, supra,* "is not a basis for disregarding other aspects of their testimony." The court responded, "Well, I don't know that I've said I'm going to disregard the other aspects of their testimony." (Tr. Vol. III 346-47). That is quite a different statement than the petitioner has represented to this Court.[1]

This case involves neither the appearance nor the actuality of bias on the part of the district judge, and review by this Court is unwarranted.

---

[1] Petitioner's remaining arguments (Pet. 22-28) are similarly unfounded. The trial court's ruling with respect to petitioner's role in the overexpenditure of GE grant funds was substantiated by the audit report itself and the testimony of the internal auditor. (Tr. Vol. V 356-60, 373-86). The district court's finding that additional funds were allocated to the School of Engineering for equipment (Pet. App. B 99) is fully supported by the record. (Tr. Ex. 134). The issue of a difference between invoice and inventory costs for some computer equipment was explained as being the result of including the costs of separately priced components plus some equipment upgrades. (Tr. Vol. VI 42-51). The asserted "verdict" by the district court consisted of the court's indication, after hearing both cases-in-chief, that he viewed the evidence to that point to be "overwhelming . . . unless you convince me to the contrary in your rebuttal proof." (Tr. Vol. V 389, 390). Such a statement is no reflection of extrajudicial bias.

II.

THE COURT OF APPEALS CORRECTLY DISPOSED OF PETITIONER'S FIRST AMENDMENT CLAIM

The petitioner challenges the Court of Appeals' review of the particularized and fact-specific balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968) and its concurrence in the district court's factual finding under the causation analysis of *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977). Further review by this Court of the fact-specific analysis of petitioner's First Amendment claim is unwarranted.

There is no specific instance of speech, no specific letter or statement, that petitioner points to as having supposedly caused his removal as dean. Rather, petitioner relies upon his pattern of outspokenness as a whole, and it is this pattern of outspokenness that must be weighed in the *Pickering* balance "between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. In performing this balancing, the statements at issue will not be considered in a vacuum; the manner, time, and place of the expression are relevant, as is the context in which the dispute arose. *Connick v. Myers*, 461 U.S. 138, 152-53 (1983).

This is not a case in which a public employee acted primarily out of a desire to expose waste and wrongdoing. Petitioner's after-the-fact comments were uniformly directed at matters already publicly disclosed and usually

already investigated. What was involved was less a matter of speech induced by civic concern than an employment related dispute. Petitioner perceived himself to be the victim of a conspiracy to harass and discredit him that supposedly emanated from the level of the Board staff and used TSU employees in attempts to discredit petitioner and the School of Engineering, which would then provide an excuse for removing petitioner as dean. (Tr. Vol. III 150-51). It was no coincidence, then, that most instances of petitioner's outspokenness either came on the heels of investigations into his own mismanagement and were aggressive, defensive responses to those criticisms of him, or were efforts to discredit those persons whom he perceived to be plotting against him.[2] "To the extent that a public employee's expression is in furtherance of matters of personal concern, the public employer's burden of showing the predominance of the public's interest in continuing the efficient functioning of a public entity is lessened." *Joyner v. Lancaster*, 815 F.2d 20, 24 (4th Cir.), *cert. denied*, 484 U.S. 830 (1987); *see also*,

---

[2] For example, petitioner's response to a TSU Internal Audit Report concluding that he had caused an overexpenditure of General Electric grant funds was to suggest that the audit was part of a witchhunt and that the Internal Auditor and the Vice President for Business and Finance were part of a "criminal network", siphoning off taxpayers' funds. (Tr. Exh. 102, 152). Petitioner's displeasure with a report of the State Comptroller's office, containing findings critical of petitioner, prompted a series of letters in which petitioner raised allegations of conflict of interest and insisted that blame should have been placed on the Vice President for Business and Finance. (Tr. Vol. III, 181-85).

Maples v. Martin, 858 F.2d 1546, 1554 (11th Cir. 1988) (Statements occurring in the context of longstanding acrimonious relations and disputes over internal policies are entitled to less weight.)

Petitioner's speech was characterized by its repetitive rehashing of issues, by its commentary on issues that had been disclosed, investigated, discussed, and grown stale. It was characterized by reckless accusations that reflected a failure to make reasonable investigation, and by baseless attacks on the personal integrity of fellow administrators with whom it was critical that petitioner, as well as the entire University community, be able to work cooperatively.[3] All of those factors weigh heavily against petitioner in the *Pickering* balance. *Egger v. Phillips*, 710 F.2d 292, 317 (7th Cir. 1983) (Criticism directed against a fellow employee necessarily implicates different interests of a public employer than would an impersonal

---

[3] Despite having participated in the audit process concerning the overexpenditure of G.E. grant funds and despite being given the opportunity to present whatever information he had on the issue, long after the release of the final audit report petitioner chose to ignore its findings and persisted in asking questions fully answered by the report itself, and also asserted that the money at issue had been "misappropriated" by the Vice President for Business and Finance. (Tr. Vol. V 361-377, Vol. III 198-201). The issue of a one million dollar investment made by TSU through an investment firm that went bankrupt was the topic of wide-spread discussion. The problem was investigated, corrective measures were taken, and the money fully recovered. Petitioner's contribution to that discussion was to repeatedly contend, in the media and on campus, that the Vice President for Business and Finance had misappropriated or stolen the money. (Tr. Vol. 216, 440, 479).

criticism of the institution generally; frequent, redundant criticisms weigh against First Amendment protection.)

Petitioner's repetitive statements and allegations, made in the media and on campus to students, faculty, and other administrators, had the purpose and clear potential of precipitating a crisis of confidence in the competence and integrity of persons charged with the administration of TSU, and of thereby causing serious damage to the morale, efficiency, and public perception of the institution.[4] Under the facts of this case, the Court of Appeals correctly concluded that petitioner's speech did not fall within the protection of the First Amendment, when weighed in the *Pickering* balance against the interest of TSU in its effective functioning.

Petitioner's argument with respect to the *Mt. Healthy* causation analysis is based on fundamental inaccuracies in characterizing the evidence. The basic premise of petitioner's argument is that his mistreatment of personnel was not the reason for the decision by TSU President Floyd and Vice President Cox to remove him from his position as dean. (Pet. 35-36). That premise finds no support in the record. The decision to remove petitioner as dean was based on an on-going pattern of abusive, intemperate, overbearing, and insubordinate conduct on petitioner's part toward staff, faculty, and superiors, behavior deemed by the president and vice president to require

---

[4] Petitioner's apparent argument that an actual, as opposed to potential or reasonably apprehensible, disruption is required (Pet. 39), has been rejected. *Connick v. Myers, supra* at 152.

new and different leadership within the School of Engineering. (Tr. Vol. II 106-09, Vol. III 495-96, Vol. VI 82, 85-86). Dr. Cox, who, as interim Vice President for Academic Affairs, recommended the removal of petitioner, based his perception of what he termed petitioner's "abusive leadership" on years of experience with petitioner's behavior, both on the basis of first-hand observation and in the form of complaints regarding petitioner that were made to Dr. Cox in his capacities as Assistant, then Associate Vice President for Academic Affairs, from 1975 until November, 1984, and as interim Vice President from August, 1986, through September, 1987. (Tr. Vol. I 253; Vol. III 375-80, 439-40, 496). On more than one occasion, Dr. Cox discussed with President Floyd his concerns about petitioner's abusive leadership (Tr. Vol. III 396, 495-96) and Dr. Floyd testified that the incidents involving petitioner of which he was personally aware and that had occurred subsequent to his becoming president in July of 1986 were ample reason to have accepted Dr. Cox's recommendation to remove petitioner. (Tr. Vol. VI 67-68, 82, 85-87).[5]

---

[5] Petitioner's reliance on testimony regarding the concerns allegedly expressed by Chancellor Garland with respect to petitioner's outspokenness (Pet. 30-31) is misplaced and based on factual inaccuracies. Chancellor Garland's testimony was that his concerns about the effects on TSU of negative publicity were not focussed on petitioner. (Tr. Vol. II 53-59). The Chancellor, Dr. Floyd, and Dr. Cox all testified that the Chancellor had no input into the decision to remove petitioner (Vol. II 48, 59, 74, 89), and Floyd and Cox were not aware of any concerns on the Chancellor's part regarding petitioner's outspokenness. (Tr. Vol. I 264-65, 356). Moreover, any such sentiments of the

(Continued on following page)

Petitioner argues that Dr. Cox voted in favor of petitioner being a candidate for the presidency of TSU, and that such an action precludes the existence of any non-retaliatory reason to remove him as dean. (Pet. 39-42). Petitioner omits any reference to Dr. Cox's explanation for that action. Dr. Cox testified that the search committee was deadlocked and that he agreed to include petitioner as one of the finalists because he felt that, if the committee interviewed petitioner, they would see some of the same behavior that Dr. Cox had witnessed over the years and would not support petitioner. (Tr. Vol. IV 61-63). In fact, petitioner was ultimately not recommended by a single person on the search committee. (*Id.* 62).

Finally, petitioner cites his accomplishments as dean. While the record raises questions about the true extent of his achievements, Drs. Floyd and Cox did, nevertheless, recognize that petitioner had made contributions to the School of Engineering. However, whatever his accomplishments in that area, they came at a price, and that price was his abusive, intemperate, and overbearing behavior toward staff, faculty, and supervisors. Drs. Cox

---

(Continued from previous page)

Chancellor are irrelevant to both the *Pickering* balancing test and the *Mt. Healthy* analysis.

Petitioner's suggestion that Dr. Floyd was "paid off" for removing petitioner by four salary increases in one year (Pet. 12, 41) is not warranted by the facts. In July, 1986, Dr. Floyd received an increase when he became interim president; in January 1987, all presidents received a salary increase; in March 1987, Dr. Floyd's salary increase was due to his being named permanent president; in July 1987, all presidents received an increase. (Tr. Vol. V 56-57).

and Floyd concluded that that price outweighed the benefit and that new leadership was needed. The evidence is overwhelming that they would have reached that decision even in the absence of petitioner's speech.

III.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE DISTRICT COURT'S FINDINGS OF FACT ON PETITIONER'S TITLE VII CLAIM WERE WELL SUPPORTED BY THE RECORD

Petitioner's argument with respect to his Title VII claim turns solely upon an analysis of the particular facts involved. Having been defeated in the Court of Appeals, petitioner seeks still another hearing and asks this Court simply to undertake a review of concurrent findings of fact by the two courts below. Further review of these questions of fact is unwarranted.

Petitioner persists in this Court, as he did below, in disregarding the facts established by the record which fully support the finding that petitioner failed to carry his burden under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981), of proving that the nondiscriminatory reasons offered by the respondents were pretextual.[6] The Board of Regents operates a decentralized system, with salary recommendations for all personnel except the university president being generated

---

[6] Contrary to petitioner's apparent assertion (Pet. 45-46), respondents did not contend that seniority and degree field were relevant to the salary decisions at issue.

from each of the institutions. There is no effort made to impose a uniform salary for the same position throughout the system and, in fact, there is substantial variance in salary levels from campus to campus. (Tr. Vol. V 36, 71). The salary of each campus president is set by the Chancellor of the Board of Regents and relates to the size and complexity of the institution as a whole. (*Id.* 31, 115-116).

Within that general framework, there are certain policies at work, one of which is that the salary of the president operates as an upper limit, or cap, on the salaries of the other personnel at that institution. (*Id.* 32, 116). This policy directly affected a salary decision with respect to the petitioner that was made during one of the three years covered by his Title VII claim.[7] For the 1984-85 academic year, the president of TSU proposed a salary for petitioner that exceeded the salary that the Chancellor had set for the president for that year, a fact of which the president was unaware at the time he made his recommendation. (*Id.* 46-47, 121). When this fact was brought to the president's attention by the Chancellor, the president reduced his recommendation for petitioner's salary. (*Id.* 122). As a result, petitioner's salary for 1984-85 was set at $662 below that of his president; the deans of engineering at MSU and Tech received salaries approximately $9,800 and $3,400 less than their respective presidents. (*Id.* 48-49).

---

[7] The district court ruled prior to trial that petitioner's salary discrimination claim was restricted to the period from January 9, 1985 until June 30, 1987, the date of his removal as dean. (Pet. App. A 65). Thus, specifically at issue were the salary decisions made with respect to petitioner for the years 1984-85, 1985-86, and 1986-87.

In an effort to show pretext, petitioner argues that for one year, 1986-87, the dean of engineering at Tech was paid $196 more than the interim president of that institution. Both courts below have rejected that argument, finding that that salary differential was reasonable as being a unique circumstance created by the presence of an interim president. (Pet. App. A 70-71; B 86-87). The fact remains that no exception was ever made in the Board of Regents system to allow the salary of any dean of engineering to exceed the salary of a permanent president. (Tr. Vol. V 35).

The salaries of the deans of engineering at Tech, MSU, and TSU also reflected the relative size and complexity of the engineering programs, with Tech's program ranking as the most complex and TSU's as the least. (*Id.* 97).[8] The relative salaries of the respective deans of engineering corresponded to this ranking as to size and complexity, with the exception that in 1986-87 the salary of the dean at MSU exceeded by $504 that of the dean at Tech. In that particular year, MSU was able to give greater salary increases than were Tech or TSU because of a

---

[8] In an attempt to support his assertion of comparability between the TSU and MSU programs, petitioner inaccurately states the evidence on the point. In 1981, in response to petitioner's demand for a salary increase, then-Chancellor Nicks determined that "the complexities of the [engineering] programs at the three institutions were not comparable." (Tr. Vol. V 117). Nevertheless, because there was "some degree of comparability" between the MSU and TSU programs at that time, he was willing to support increasing petitioner's salary to the level of the MSU dean for 1981-82. (*Id.* 117-119). There was never any agreement that petitioner's salary would or should always remain equal to that of the MSU dean. (*Id.* 119).

larger pool of funds resulting from increased student fee revenues. (*Id.* 43-44). The correlation between salary and size and complexity of the engineering programs was less apparent at the level of associate or assistant dean, a fact that both lower courts rejected as proof of pretext because those positions are not fairly comparable given the variation of their duties and functions from university to university. (*Id.* 70-71).

With respect to the second of the three years encompassed by petitioner's Title VII claim, 1985-86, the salary increase recommended for petitioner by the TSU president through the normal budget process was fully approved. (*Id.* 54-55). A belated recommendation from the president, made upon his departure from TSU, for an additional "equity adjustment" to petitioner's salary was viewed by the Board staff as unusual and was submitted to TSU's new interim president for review. (*Id.* 51-52). Despite petitioner's assertion to the contrary (Pet. 52), the undisputed testimony of the interim president was that he did review that proposed action and chose not to resubmit it to the Board. (Tr. Vol. IV 196-98). In 1986-87, the recommended increase in petitioner's salary was fully approved by the Board.

The evidence relevant to petitioner's Title VII claim has been fully reviewed by both the district court and Court of Appeals and found insufficient to support a conclusion that the salary decisions with respect to petitioner were motivated by his race. Further review of these facts by this Court is unwarranted.

IV.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT PROPERLY DECIDED THE ISSUE OF QUALIFIED IMMUNITY

Under the particularized analysis required by *Anderson v. Creighton*, 483 U.S. 635 (1987), respondents Garland, Floyd, and Cox were clearly entitled to qualified immunity from damages arising from petitioner's First Amendment claim. The district court had before it the results of extensive discovery which presented undisputed evidence concerning the content, form, context, time, place, and manner of petitioner's speech. The undisputed evidence reflected elements of personal interest and vindictiveness as the motivation for petitioner's speech, repetitive raising of stale issues, repeated assaults on the personal integrity of fellow administrators, and a propensity to recklessly make baseless and false allegations. Based on that evidence, reasonably competent officials could have disagreed on whether and to what extent petitioner's comments were protected by the First Amendment.

The result is not affected by the letter written by the Board's General Counsel, referred to by petitioner. (Pet. 56). That letter simply contained a broadly stated reference to a general First Amendment right. It contained no particularized assessment of whether a specific instance of speech by petitioner was protected by the First Amendment.[9]

---

[9] That letter, which was not directed to the Chancellor, stated, "Any correspondence with Dean Isibor relating to

(Continued on following page)

V.

PETITIONER'S CHALLENGE TO THE COURT OF APPEALS' DETERMINATION AS TO PUBLICATION OF ITS OPINION IN THIS CASE IS WITHOUT MERIT

Rule 24 of the U.S. Court of Appeals for the Sixth Circuit sets forth the criteria to be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter.[10] The rule also provides that citation of unpublished decisions is disfavored, unless "counsel believes . . . that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well", in which case such a decision may be cited. Rule 24(c).

The decision of the Court of Appeals in this case was designated by the panel as not recommended for full-text publication. Petitioner's argument that this poses an "undesirable restriction to full access to the total record in this case", which will "hide the truth from the public" (Pet. 58) and be used "to conceal the unfair decision in this case" (*Id.* 61), is without merit. The full record in this

---

(Continued from previous page)

communications regarding the audit of activities in the School of Engineering should not include reference to any procedure which may be perceived to 'chill' the First Amendment rights of any faculty or administrator."

[10] Those criteria include (i) whether it establishes a new rule of law; (ii) whether it creates or resolves a conflict of authority; (iii) whether it discusses a legal or factual issue of continuing public interest; (iv) whether it is accompanied by a concurring or dissenting opinion; (v) whether it reverses the decision below.

case is open to the public, and the provisions of Sixth Circuit Rule 24 have neither the purpose nor the effect of cloaking decisions in secrecy. Review by this Court of this issue is unwarranted.

CONCLUSION

The petitioner has failed to provide any reason for this Court to grant the petition for writ of certiorari. The court below has not rendered a decision in conflict with the decision of any other federal court of appeals or of this Court, has not decided an important, unsettled question of federal law, and has not acted in a manner calling for an exercise of this Court's power of supervision. The petition presents primarily questions of fact which do not merit Court review. Accordingly, respondents urge this Court to deny the petition for writ of certiorari.

CHARLES W. BURSON
Attorney General & Reporter
State of Tennessee

JOHN KNOX WALKUP*
Solicitor General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37243-0485

LINDA A. ROSS
Assistant Attorney General
State of Tennessee

*Counsel of Record